

87-1570

No. 87-

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1987

Supreme Court, U.S.

FILED

MAR 18 1988

JOSEPH E. SPANIO, JR.
CLERK

ARTHUR D. WARD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI
AND APPENDIX

Lowell H. Becraft, Jr.
209 Lincoln Street
Huntsville, Alabama 35801
(205) 533-2535

Counsel of Record for
Petitioner Arthur D. Ward



QUESTION PRESENTED FOR REVIEW

Other than non-resident aliens and citizens of the United States residing abroad, is the individual income tax imposed by the 1954 Internal Revenue Code applicable only to resident aliens and citizens of the United States who either reside within or have income from sources within the "jurisdiction of the United States"?¹

1 The caption of this petition contains the names of all the parties to the proceedings in the Court of Appeals.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
I. The parties and the underlying controversy	3
II. Proceedings in the District Court	4
III. Proceedings in the Court of Appeals	6
REASONS FOR ALLOWANCE OF THE WRIT	7
I. The Court of Appeals has sanctioned a severe departure from the law descriptive of the limited "jurisdiction of the United States"	7
II. The Court of Appeals has departed from the precedence of this Court and permitted a liability for taxes to be implied	16

	Page
CONCLUSION	22
APPENDIX A	
Opinion of the Court of Appeals dated December 16, 1987	1
Order of the Court of Appeals denying rehearing	3
Sentencing judgment and order of the District Court	5
APPENDIX B	9
Constitutional Provisions, Statutes and Other Authorities	

TABLE OF AUTHORITIES

Cases:

<i>Adams v. United States,</i> 319 U.S. 312 (1943)	12
<i>American Banana Company v. United Fruit Company.</i> 213 U.S. 347 (1909)	9
<i>Bailey v. Drexel Furniture Co.,</i> 259 U.S. 20 (1922)	8
<i>Baldwin v. Franks,</i> 120 U.S. 678 (1887)	8
<i>Benziger v. United States,</i> 192 U.S. 38 (1904)	16
<i>Blackmer v. United States,</i> 284 U.S. 421 (1932)	9
<i>Bowen v. Johnston,</i> 306 U.S. 19 (1939)	12
<i>Brafman v. United States,</i> 384 F.2d 863 (5th Cir., 1967)	16
<i>Caha v. United States,</i> 152 U.S. 211 (1894)	9
<i>Coyle v. Smith,</i> 221 U.S. 559 (1911)	8
<i>Cunard S. S. Co. v. Mellon,</i> 262 U.S. 100 (1923)	12

<i>Foley Bros. v. Filardo,</i> 336 U.S. 281 (1949)	9
<i>Fort Leavenworth R. Co. v. Lowe,</i> 114 U.S. 525 (1885)	10
<i>Gould v. Gould,</i> 245 U.S. 151 (1917)	16
<i>Hammer v. Dagenhart,</i> 247 U.S. 251 (1918)	8
<i>Hill v. Wallace,</i> 259 U.S. 44 (1922)	8
<i>Hopkins F. S. & L. Assn. v. Cleary,</i> 296 U.S. 315 (1935)	8
<i>In re Ladd,</i> 74 F. 31 (D.Neb., 1896)	11
<i>Keller v. United States,</i> 213 U.S. 138 (1909)	8
<i>License Tax Cases,</i> 72 U.S. (5 Wall.) 462 (1867)	8
<i>Linder v. United States,</i> 268 U.S. 5 (1925)	8
<i>McKeel v. Islamic Republic of Iran,</i> 722 F.2d 582 (9th Cir., 1983)	9
<i>Meredith v. United States,</i> 330 F.2d 9 (9th Cir., 1964)	9

<i>Old Colony R. Co. v. Commissioner of Internal Revenue,</i> 284 U.S. 552 (1932)	16
<i>Pacific Coast Dairy v. Dept. of Agriculture of California,</i> 318 U.S. 285 (1943)	12
<i>Patterson v. Kentucky,</i> 97 U.S. 501 (1879)	8
<i>Paul v. United States,</i> 371 U.S. 245 (1963)	12
<i>Penn Dairies v. Milk Control Commission of Pennsylvania,</i> 318 U.S. 261 (1943)	12
<i>People v. Godfrey,</i> 17 Johns. 225 (N.Y., 1819)	11
<i>Sandberg v. McDonald,</i> 248 U.S. 185 (1918)	9
<i>Service v. Dulles,</i> 354 U.S. 363 (1957)	16
<i>Smietanka v. First Trust Savings Bank,</i> 257 U.S. 602 (1922)	16
<i>Spreckels Sugar Refining Co. v. McClain,</i> 192 U.S. 397 (1904)	16
<i>State v. Tully,</i> 31 Mont. 365, 78 P. 760 (1904)	15
<i>United States v. Alonso,</i> 673 F.2d 334 (11th Cir., 1982)	15

<i>United States v. Bateman,</i> 34 F. 86 (N.D.Cal., 1888)	11
<i>United States v. Bevens,</i> 16 U.S. (3 Wheat.) 336 (1818)	10
<i>United States v. Bowman,</i> 260 U.S. 94 (1922)	9
<i>United States v. Butler,</i> 297 U.S. 1 (1936)	8
<i>United States v. Cornell,</i> 25 Fed. Cas. 646, No. 14, 867 (C.C.D.R.I., 1819)	11
<i>United States v. Dewitt,</i> 76 U.S. (9 Wall.) 41 (1870)	8
<i>United States v. Eliason,</i> 41 U.S. (16 Pet.) 291 (1842)	16
<i>United States v. First National City Bank,</i> 321 F.2d 14 (2nd Cir., 1963)	9
<i>United States v. Fox,</i> 94 U.S. 315 (1877)	8
<i>United States v. Fox,</i> 95 U.S. 670 (1878)	8
<i>United States v. Marino-Garcia,</i> 679 F.2d 1373 (11th Cir., 1982)	15
<i>United States v. Merriam,</i> 263 U.S. 179 (1923)	16

<i>United States v. Penn,</i> 48 F. 669 (E.D.Va., 1880)	11
<i>United States v. Shaughnessy,</i> 347 U.S. 260 (1954)	16
<i>United States v. State Tax Commission of Mississippi,</i> 412 U.S. 363 (1973)	12
<i>United States v. Townsend,</i> 474 F.2d 209 (5th Cir., 1973)	15
<i>United States v. Tully,</i> 140 F. 899 (D.Mon., 1905)	15
<i>United States v. Unzeuta,</i> 281 U.S. 138 (1930)	12
<i>United States v. Watkins,</i> 22 F.2d 437 (N.D.Cal., 1927)	11
<i>Vitarelli v. Seaton,</i> 359 U.S. 535 (1959)	16
<i>Western Union Tel. Co. v. Brown,</i> 234 U.S. 542 (1914)	12
<i>Western Union Tel. Co. v. Chiles,</i> 214 U.S. 274 (1909)	11

Statutes:

18 U.S.C., section 7	3
26 U.S.C., section 7201	3
53 Stat., part I	17
Title 26, U.S.C., sections 6001 and 6011	19
Title 26, U.S.C., sections 1, 61, 861, 862, 871, 874, 881, 882, 1441, and 1461	20

Other Authorities:

23 Treas. Dec. Int. Rev. 352, Treasury Decision 3146	17
24 Treas. Dec. Int. Rev. 207, Treasury Decision 3295	17
26 Treas. Dec. Int. Rev. 745, Treasury Decision 3640	17
28 Treas. Dec. Int. Rev. 558, Treasury Decision 3922	17

<i>Jurisdiction Over Federal Areas Within the States: Report of the Interdepartmental Committee for the Study of Jurisdiction Over Federal Areas Within the States, part II</i>	13
---	----

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Arthur D. Ward hereby petitions this Court for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The Court of Appeals' opinion affirming the criminal conviction of Ward was entered on December 16, 1987, is reported at *United States v. Ward*, 833 F.2d 1538 (11th Cir., 1987), and appears in the Appendix hereto (A) at 1. A timely filed Petition for Rehearing With Suggestion of En Banc Consideration was subsequently filed; such petition for rehearing was denied on January 19, 1988. The order denying such petition is unreported and appears in the Appendix hereto (A) at 3.

Trial of this cause was held before the United States District Court for the Middle District of Florida; on April 13, 1987, such District Court entered a judgment and sentence against Ward, which order is unreported; that judgment appears in the Appendix hereto (A) at 5. The errors of which Ward complains were committed during the course of such trial, and the orders entered in reference thereto were simple denials; these orders are not reproduced in the Appendix.

JURISDICTION

The judgment sought to be reviewed by this petition was entered in the United States Court of Appeals for the Eleventh Circuit on December 16, 1987. A timely filed Petition for Rehearing and Suggestion for En Banc Consideration was filed on January 4, 1988, within the time permitted by the Eleventh Circuit Local Court Rules. Ward's petition for rehearing was denied on January 19, 1988; see Appendix, at 3.

The jurisdiction of this Court regarding this Petition is established pursuant to 28 United States Code, section 1254 (1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

UNITED STATES CONSTITUTION, Article 1, Section 8,
Clause 17:

"To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings."

UNITED STATES CONSTITUTION, Article IV, Section 3,
Clause 2:

"The congress shall have power to dispose of and make all needful rules and regulations

respecting the territory or other property belonging to the United States.”

The relevant statutes and regulations involved in the question presented appear in Appendix B hereto.

STATEMENT OF THE CASE

In December, 1986, a federal grand jury in the Middle District of Florida returned a five (5) count indictment against Arthur D. Ward. Three counts thereof charged tax evasion under 26 U.S.C., section 7201, and two counts charged violations of 18 U.S.C., section 1001, the making of false claims to a federal agency. The jurisdiction of the U.S. District Court for the Middle District of Florida was obtained pursuant to 18 U.S.C., section 3231.

Ward was arraigned on January 22, 1987 and was put to trial on March 5, 1987. The errors of which Ward complains relate to a motion for a judgment of acquittal based upon the legal theory hereinafter discussed and requested jury instructions on the same grounds; the motion for judgment of acquittal was in effect denied and the requested jury instructions were not given and no similar instructions were made by the trial court. The argument on appeal has been based upon Ward's legal theory which was the foundation of the motion for judgment of acquittal and the requested jury instructions.

I. The parties and the underlying controversy.

For tax year 1980, Ward filed a Form 1040 personal income tax return on or before April 15, 1981; on this return, Ward claimed a sizeable charitable contribution deduction for contributions made to a church. For tax year 1981, Ward filed a Form 1040 personal income tax return on or before April 15, 1982. On this return, Ward claimed on a schedule "C" attached to that return an amount attributed to "costs of goods sold," which amount slightly exceeded the total amount of his wages and other receipts

received for that year, the operation of which produced no income tax due. For tax year 1982, Ward filed a return similar in nature to the return filed the previous year.

In the indictment herein, the prosecution claimed that Ward committed tax evasion for the tax year 1980 by taking the very large charitable contribution for which he allegedly was not entitled, thus substantially reducing his tax liability. For tax year 1981, the prosecution contended that Ward committed tax evasion by claiming allegedly non-existent "costs of goods sold", and he likewise committed the offense of submitting a false claim by attaching the above mentioned schedule "C" to his return. For tax year 1982, the prosecution made similar evasion and false claims allegations based upon similar facts.

II. Proceedings in the District Court

The evidence presented by the prosecution to prove the commission by Ward of the five (5) felonies enumerated above can be very succinctly stated. The prosecution proved that Ward filed form 1040 personal income tax returns during his adult life up to and through the year 1977. Ward's returns for 1978 and 1979 resulted in proceedings in tax court. Further, the prosecution proved that Ward worked for and received salaries from two state chartered corporations named Applimation, Inc., and Martin-Marietta for the period of time from October, 1979, through the time of trial. The evidence further showed that Ward was a client of the stock brokerage firm of Merrill-Lynch and engaged in a number of securities purchases and sales.

To establish the commission of the above offenses, the prosecution introduced some evidence to show that the charitable contributions made to a church during tax year 1980 were not legitimate deductions. Further, some of the prosecution evidence disclosed that Ward did not have a legitimate right to deductions for "costs of goods sold" during tax years 1981 and 1982. However, no evidence was introduced at trial to show that either

Ward or his income was subject to the Federal income tax.

At the conclusion of the prosecution's evidence, Ward moved for a judgment of acquittal and argued that, under the facts of the prosecution's case, it was not shown that an income tax was imposed on Ward or his income. Ward argued that the 1954 Internal Revenue Code imposed an income tax only upon citizens and residents of the United States. For U.S. Citizens, the only tax which was imposed was upon income of such citizens from abroad, either from sources within a foreign country or a U.S. possession. No contention was made by the prosecution that Ward was an alien, either resident or non-resident. The trial court reserved judgment on Ward's motion. Thereafter, the defense presented its evidence, the essence of which showed that Ward was not an alien, either resident or non-resident, that he was not a withholding agent for any alien or foreign corporation, and that he did not, during the years 1980, 1981 and 1982, live or work abroad or within a U.S. possession. All of the evidence showed that during these years, Ward was a citizen of Florida, had income from sources within the States of this Union, and was not subject to the jurisdiction of the United States.

At the close of all the evidence, Ward renewed his motion for judgment of acquittal, which motion was likewise reserved by the trial court. Ward submitted proposed jury instructions based upon the above legal theory, but these instructions were denied. After the jury convicted Ward on all charges set forth within the indictment, Ward filed a timely post-trial motion raising the same legal argument, but this motion was denied. Ward was subsequently sentenced on April 13, 1987, and thereafter filed his notice of appeal to the United States Court of Appeals for the Eleventh Circuit.

III. Proceedings in the Court of Appeals.

On appeal to the United States Court of Appeals, Ward explicitly argued that the "jurisdiction of the United States" existed only within Washington, D.C., the federal enclaves within the States, in the territories and possessions of the United States, and on the "high seas". Ward noted that by duly promulgated income tax regulations, the federal income tax was imposed only upon citizens of the United States "subject to its jurisdiction." From this premise, Ward argued that, based upon prior federal income tax laws and the 1954 Internal Revenue Code, the individual income tax was in essence imposed only upon the income of aliens from sources within the jurisdiction of the United States and the income of U.S. citizens abroad. In response to Ward's argument that the tax was not imposed on the income of U.S. citizens from sources even within the jurisdiction of the United States, the prosecution in its brief admitted as follows:

"The government is unable, therefore, to offer case authority for the universally accepted proposition that a citizen of the United States, working and residing in the United States, subject to federal law, earning wages, and responsible for filing an income tax return, is liable for taxation."

Notwithstanding the citation of more than 70 different case authorities by Ward in support of his argument and the citation of no authority by the government, the Court of Appeals misconstrued Ward's argument and then simply dismissed it as frivolous. Ward petitioned for rehearing en banc, but this petition was denied.

REASONS FOR ALLOWANCE OF THE WRIT

This case is worthy of review by Writ of Certiorari for at least two primary reasons: First, by means of a long and full line of decisions from this Court and other federal and state appellate courts, an accurate description of the "jurisdiction of the United States" can be easily ascertained; but, notwithstanding this authority, the Court of Appeals below refused to acknowledge this authority describing the "jurisdiction of the United States" and simply labelled Ward's argument regarding the extent of "its jurisdiction" as frivolous, and this being done without the slightest supporting authority being mentioned. The decision of the Court of Appeals thus sanctions a great and severe departure from established precedence almost two centuries old.

Secondly, while Ward's argument regarding precisely which "individual" and whose income is taxed by the federal income tax may appeared to be novel, it is novel only in the sense that the precise issue does not appear to have been previously raised. However, enough case authority from this and other courts exists to conclusively demonstrate that, based upon certain legal principles, Ward's position is entirely correct. But, the Court of Appeals, contrary to established rules of statutory constriction and the rule that federal tax acts cannot create a liability for tax by implication, has expressly permitted liability for tax to arise by implication. On this issue, the Court of Appeals has once again sanctioned a departure from the established precedence of this Court.

I. The Court of Appeals has sanctioned a severe departure from the law descriptive of the limited "jurisdiction of the United States."

The Constitution of the United States grants legislative powers to the Congress by means of two separate provisions. In Article I, section 8 of that Constitution, Congress has some 18 specific and well defined delegated state powers. Additionally, in Article IV, section 3, clause 2, Congress is given the power to enact

"needful rules and regulations" to govern the territory and other property of the United States. The powers of Congress to act within the States of the Union is carefully prescribed, and this is in contrast to its powers within "its jurisdiction," where the Congress in essence possesses powers similar to that of a state legislature.

This Court has established some of the parameters of Congressional powers within the States of the Union. In the *License Tax Cases*, 72 U.S. (5 Wall.) 462 (1867), it was held that Congress could not authorize the conduct of business within the states in order to tax that business. In *United States v. Dewitt*, 76 U.S. (9 Wall.) 41 (1870), it was held that the police power of Congress exists only within "its jurisdiction." In *United States v. Fox*, 94 U.S. 315 (1877), it was decided that questions regarding titles to real property within the States were inappropriate subjects of Congressional power. In *United States v. Fox*, 95 U.S. 670 (1878), it was decided that Congress had no real, inherent power to criminally punish within the States; see also *Patterson v. Kentucky*, 97 U.S. 501 (1879). In *Baldwin v. Franks*, 120 U.S. 678 (1887), it was held that the Civil Rights legislation of the Civil War era could not be applied within state jurisdiction. In *Keller v. United States*, 213 U.S. 138 (1909), Congressional power to criminally punish acts of prostitution within state jurisdiction was held void. In *Coyle v. Smith*, 221 U.S. 559 (1911), a Congressional attempt to dictate the location of a state's capitol was held void. In the three cases of *Hammer v. Dagenhart*, 247 U.S. 251 (1918), *Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922), and *Hill v. Wallace*, 259 U.S. 44 (1922), it was held that Congress had no inherent power to regulate the conduct of business within the States. In *Linder v. United States*, 268 U.S. 5 (1925), a conclusion was reached that Congress had no inherent power to regulate the practice of medicine within the States. In *Hopkins F. S. & L. Assn. v. Cleary*, 296 U.S. 315 (1935), attempts to "federalize" state financial institutions over the objections of a State were held impermissible. And in *United States v. Butler*, 297 U.S. 1 (1936), Congressional power to control agricultural production within the

States was held invalid. In light of the above, it is obvious that there exist clear boundaries of Congressional powers within the States of the Union.

Every legislative act emanating from Congress creates the question of where that act shall apply. Is the act one applicable within the States of the Union, and thus the exercise of a delegated power found within Article I, section 8? Or, is it an act based upon the power of Congress granted through Article IV, section 3, clause 2, and thus applicable only to the territory and property of the United States? To aid in the resolution of this issue of where federal laws shall apply, a rule has been enunciated that federal "legislation is meant to apply only within the territorial jurisdiction of the United States unless a contrary intent appears"; see *Caha v. United States*, 152 U.S. 211, 215 (1894); *American Banana Company v. United Fruit Company*, 213 U.S. 347, 357 (1909); *Sandberg v. McDonald*, 248 U.S. 185, 195 (1918); *United States v. Bowman*, 260 U.S. 94, 98 (1922); *Blackmer v. United States*, 284 U.S. 421, 437 (1932); *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949); *United States v. First National City Bank*, 321 F.2d 14, 23 (2nd Cir., 1963); *Meredith v. United States*, 330 F.2d 9, 11 (9th Cir., 1964); and *McKeel v. Islamic Republic of Iran*, 722 F.2d 582, 589 (9th Cir., 1983).

In Article I, section 8, clause 17 of the U.S. Constitution, Congress was given the power of "exclusive legislation" within its capitol (Washington, D.C.), and also within "forts, magazines, arsenals, dockyards and other needful buildings." It is this clause of the Constitution as repeatedly construed by this and other courts which fully and completely describes the territorial jurisdiction of the United States within the States of the Union.

One of the paramount cases dealing with the subject of the jurisdiction of the United States is *United States v. Bevans*, 16 U.S. (3 Wheat.) 336 (1818), which involved a federal murder prosecution committed on board a U.S. warship lying in the harbor of Boston, Massachusetts. Here, this Court held that the "jurisdiction of the United States" within the States arises via the operation of Article I, section 8, clause 17, and the United States acquires jurisdiction in a State by purchasing land therein and having the State cede jurisdiction thereof to the United States.

Another major case describing the territorial jurisdiction of the United States is *Fort Leavenworth R. Co. v. Lowe*, 114 U.S. 525 (1885), which involved an attempt by the Kansas state legislature to tax the property of the railroad located within the Fort Leavenworth federal enclave. Here, this Court described the method by which the United States acquires territorial jurisdiction within a State as follows:

"The consent of the states to the purchase of lands within them for the special purposes named, is, however, essential, under the constitution, to the transfer to the general government, with the title, of political jurisdiction and dominion. Where lands are acquired without such consent, the possession of the United States, unless political jurisdiction be ceded to them in some other way, is simply that of an ordinary proprietor. The property in that case, unless used as a means to carry out the purposes of the government, is subject to the legislative authority and control of the states equally with the property of private individuals," 114 U.S., at 531.

Upon the authority of both *Bevans* and *Fort Leavenworth R. Co.*, supra, subsequent cases in this Court and federal and state appellate courts have had ample opportunity to judicially elucidate the precise boundaries of the territorial jurisdiction of the United States. In *People v. Godfrey*, 17 Johns. 225 (N.Y., 1819), a murder committed at Fort Niagara, a federal fort, was held to be subject to the jurisdiction of the State of New York because that State had not ceded jurisdiction of the fort to the United States. But in *United States v. Cornell*, 25 Fed. Cas. 646, No. 14, 867 (C.C.D.R.I., 1819), a murder committed at a federal fort for which the State had ceded jurisdiction to the United States was held to be within the jurisdiction of the United States.

In *United States v. Bateman*, 34 F. 86 (N.D.Cal., 1888), a murder committed at the Presidio, a federal fort in San Francisco, California, was held to be within the jurisdiction of the State of California since California had never ceded jurisdiction to the United States. But, before 1927, California did so cede the Presidio to the jurisdiction of the United States, so that thereafter a murder committed there was committed within the jurisdiction of the United States; see *United States v. Watkins*, 22 F.2d 437 (N.D.Cal., 1927).

In *In re Ladd*, 74 F. 31 (D.Neb., 1896), an attempt by state authorities to impose criminal penalties relating to liquor sales in a federal enclave within the jurisdiction of the United States was held inoperative therein. In *United States v. Penn*, 48 F. 669 (E.D.Va., 1880), a federal prosecution for a petty larceny at the Arlington National Cemetery was held to be impossible of federal prosecution because the offense was committed within the jurisdiction of Virginia, that state not having ceded jurisdiction of the cemetery to the United States.

During this century, this Court has had repeated occasions to define the jurisdiction of the United States. In *Western Union Tel. Co. v. Chiles*, 214 U.S.

274 (1909), this Court held that a Virginia state law could not be enforced within the jurisdiction of the United States; see also *Western Union Tel. Co. v. Brown*, 234 U.S. 542 (1914). In *Cunard S. S. Co. v. Mellon*, 262 U.S. 100 (1923), it was held that the Eighteenth Amendment and the National Prohibition Act were applicable only within the jurisdiction of the United States. In *United States v. Unzeuta*, 281 U.S. 138 (1930), it was decided that the United States and not the State of Nebraska had jurisdiction over a murder committed within a federal military reservation in that state; see also *Bowen v. Johnston*, 306 U.S. 19 (1939). But, in *Adams v. United States*, 319 U.S. 312 (1943), a lack of federal jurisdiction was found regarding rapes committed at a federal fort.

In *Pacific Coast Dairy v. Dept. of Agriculture of California*, 318 U.S. 285 (1943), California laws relating to milk sales were held unenforceable within federal jurisdiction. But, in *Penn Dairies v. Milk Control Commission of Pennsylvania*, 318 U.S. 261 (1943), this Court held that state law governed a sale of milk to the federal government for the reason that the State of Pennsylvania had not ceded jurisdiction of the military facility in question to the United States; see also *Paul v. United States*, 371 U.S. 245 (1963), and *United States v. State Tax Commission of Mississippi*, 412 U.S. 363 (1973).

The refined essence of all these and similar cases from other appellate courts is that transfers of jurisdiction within the States occur by operation of Article I, section 8, clause 17. Within the States, jurisdiction over all persons and property within the borders thereof is possessed by the States. In order for the United States to acquire jurisdiction within any State, it must acquire title to the real property and then obtain a cession of jurisdiction from that State's legislature. In the absence of such a cession of jurisdiction, the State will have jurisdiction over federally owned property.

The rule of law set forth above is so clear and unambiguous that it has been formally acknowledged by the federal government itself. In June, 1957, the government of the United States published a treatise entitled *Jurisdiction Over Federal Areas Within the States: Report of the Interdepartmental Committee for the Study of Jurisdiction Over Federal Areas Within the States*, part II, which stated as follows:

"The Constitution gives express recognition to but one means of Federal acquisition of legislative jurisdiction — by State consent under Article I, section 8, clause 17

Justice McLean suggested that the Constitution provided the sole mode for transfer of jurisdiction, and that if this mode is not pursued, no transfer of jurisdiction can take place," *Id.*, at 41.

"It scarcely needs to be said that unless there has been a transfer of jurisdiction (1) pursuant to clause 17 by a Federal acquisition of land with State consent, or (2) by cession from the State to the Federal Government, or unless the Federal Government has reserved jurisdiction upon the admission of the State, the Federal Government possesses no legislative jurisdiction over any area within a State, such jurisdiction being for exercise by the State, subject to non-interference by the State with Federal functions," *Id.*, at 45.

"The Federal Government cannot, by unilateral action on its part, acquire legislative jurisdiction over any area within the

exterior boundaries of a State," *Id.*, at 46.

"On the other hand, while the Federal Government has power under various provisions of the Constitution to define, and prohibit as criminal, certain acts or omissions occurring anywhere in the United States, it has no power to punish for various other crimes, jurisdiction over which is retained by the States under our Federal-State system of government, unless such crime occurs on areas as to which legislative jurisdiction has been vested in the Federal Government," *Id.*, at 107.

Ward's position before the Court of Appeals was that the "jurisdiction of the United States" was an integral part of the federal income tax. Ward noted that the "territorial jurisdiction of the United States" existed only within Washington, D.C., the federal enclaves within the States and in the territories and possessions of the United States. But, he also acknowledged a fuller description of the total "jurisdiction of the United States" which not only includes the above areas, but also covers the "high seas" and vessels thereon, "guano islands," and flights of aircraft in airspace or outer space located over other areas within "the jurisdiction of the United States." Ward specifically noted that the best statutory and legal definition of "its jurisdiction" is found at 18 U.S.C., section 7, which carefully describes all areas within the jurisdiction of the United States.

Of all the circuits which must be confronted with serious jurisdictional questions, the U.S. Court of Appeals for the Eleventh Circuit most probably has more than the rest, and this is due to the fact that, within that circuit, there are more federal drug prosecutions than anywhere else. The Caribbean Ocean is known as a conduit for drugs imported into this country from other

regions. The United States has "high seas" jurisdiction just off the coasts of Alabama, Florida and Georgia, and these drug prosecutions most often involve conspiracies to import drugs into the United States, which is this strip of "high seas" jurisdiction around these states. And convictions obtained for such conspiracies inevitably end up at the Eleventh Circuit; see *United States v. Alonso*, 673 F.2d 334 (11th Cir., 1982); and *United States v. Marino-Garcia*, 679 F.2d 1373 (11th Cir., 1982). But, in Ward's case, no evidence was introduced regarding Ward being within the "high seas", "guano islands" or atmospheric jurisdiction of the United States. All the evidence clearly showed that he was not "within jurisdiction of the United States"; see *United States v. Townsend*, 474 F.2d 209 (5th Cir., 1973), which is precedence within the Eleventh Circuit.

It is true that occasionally jurisdictional problems may be troublesome; see *State v. Tully*, 31 Mont. 365, 78 P. 760 (1904), and *United States v. Tully*, 140 F. 899 (D.Mon., 1905). But, by and large, such questions are easy to determine, especially when the question presented is merely what is the full description of the "jurisdiction of the United States." In response to Ward's argument regarding "its jurisdiction," the Court of Appeals erroneously asserted that Ward contended that "its jurisdiction" was only a subset of the full jurisdiction described in 18 U.S.C., section 7. Having misconstrued Ward's argument, the Court of Appeals then described that argument as "frivolous." In doing so, the Court of Appeals dangerously departed from all precedence and authority on the point.

The distinction between federal and state jurisdictions is extremely important, if not crucial, to the successful operation of the unique governmental system established in this country. Departure from these principles of law inevitably will lead to clashes and conflicts between the States and the federal government and the sure consequence of the resulting antagonism will weaken and possibly destroy this Republic. The Court of Appeals by its decision has started this process of blurring the distinction between state and federal jurisdiction by dan

gerously departing from established jurisdictional principles. Because of this, Ward's writ should be granted.

II. The Court of Appeals has departed from the precedence of this Court and permitted a liability for taxes to be implied.

In reference to federal tax legislation, this Court has repeatedly held that liability for federal taxes must be expressed and not implied; see *Benziger v. United States*, 192 U.S. 38, 55 (1904); *Spreckels Sugar Refining Co. v. McClain*, 192 U.S. 397, 416 (1904); *Gould v. Gould*, 245 U.S. 151, 153 (1917); *Smietanka v. First Trust Savings Bank*, 257 U.S. 602, 606 (1922); and *United States v. Merriam*, 263 U.S. 179 (1923). And as noted above, all federal legislation is applicable only within the territorial jurisdiction of the United States unless a contrary intent appears. The question thus remains: is the federal income tax also applicable only within "its jurisdiction"?

After the ratification of the Sixteenth Amendment in 1913, Congress adopted federal income tax legislation in the years 1913, 1916, 1919, 1921, 1924, 1926, 1928, 1932, 1934, 1936 and 1938. Each such Congressional act has authorized the Secretary of the Treasury and the Commissioner of Internal Revenue to promulgate rules and regulations for the enforcement of such acts; see for example, Revenue Act of 1918, 40 Stat. 1057, ch. 18, section 1309, 40 Stat., at 1143. Regulations duly promulgated and published are binding and enforceable against the government; see *United States v. Eliason*, 41 U.S. (16 Pet.) 291 (1842); *Old Colony R. Co. v. Commissioner of Internal Revenue*, 284 U.S. 552 (1932); *United States v. Shaughnessy*, 347 U.S. 260 (1954); *Service v. Dulles*, 354 U.S. 363 (1957); *Vitarelli v. Seaton*, 359 U.S. 535 (1959); and *Brafman v. United States*, 384 F.2d 863 (5th Cir., 1967).

Starting with the regulations promulgated for the 1918 income tax act, such regulations did describe generally the subjects of the various acts. On January 28, 1921, Regulations No. 45 were promulgated to enforce the Revenue Act of 1918; see 23 Treas.

Dec. Int. Rev. 352, Treasury Decision 3146. In Article 2 of these regulations, the subjects of the income tax were described as "citizens or residents of the United States." In further defining U.S. citizens, Article 4 thereof defined such "individuals" as follows:

"Art. 4. Who is a citizen. Every person born in the United States subject to its jurisdiction, or naturalized in the United States, is a citizen."

An identical regulation was also promulgated for the Revenue Act of 1921; see 24 Treas. Dec. Int. Rev. 207, Treasury Decision 3295, Regulations No. 62, dated February 15, 1922.

After the enactment of the Revenue Act of 1924, Regulations No. 65, dated October 6, 1924, were published; see 26 Treas. Dec. Int. Rev. 745, Treasury Decision 3640. These regulations likewise described the subjects of the tax as "individual citizens or residents of the United States." Article 4 of these regulations made a slight but insignificant change in the definition of "citizen":

Art. 4. Who is a citizen. Every person born or naturalized in the United States, and subject to its jurisdiction, is a citizen."

And the corresponding provisions of the Regulations No. 69 for the Revenue Act of 1926 were identical; see 28 Treas. Dec. Int. Rev. 558, Treasury Decision 3922, dated August 28, 1926.

The Internal Revenue Code of 1939 was adopted on February 10, 1939; see 53 Stat., part I. Regulations No. 111 were thereafter promulgated, and Section 29.11- 3 of these regulations defined a "citizen" as follows:

"Sec. 29.11-3. Who is a citizen. Every person born or naturalized in the United States, and subject to its jurisdiction, is a citizen."

The Regulations No. 111 for the 1939 Code were eventually replaced by Regulations 118 for the same Code. Section 39.11-3 of these regulations defined a "citizen" as follows:

"Sec. 39.11-3. Who is a citizen. Every person born or naturalized in the United States, and subject to its jurisdiction, is a citizen"

Today, regulations for the 1954 Internal Revenue Code, 68A Stat., are in effect. And Treasury Income Tax Regulation 1.1-1(c) reads as follows:

"Who is a citizen. Every person born or naturalized in the United States, and subject to its jurisdiction, is a citizen."

Thus, from the long line of Treasury Decisions promulgated to enforce the federal income tax, being subject to "its jurisdiction" is all important in making the determination as to who is subject to such tax.

For an "individual" subject to the jurisdiction of the United States, it is important to know who has a requirement to file an income tax return and whose income is so taxed. Regarding the requirement of filing a tax return, and to demonstrate why the 1954 Code manifests itself the way it does, it is important to consider the statement of Thomas G. Shearman given before the House Ways and Means Subcommittee on Internal Revenue on October 16, 1893. On this occasion, Mr. Shearman stated:

"Reflection will show, and experience proves, that a vast amount of income is received under circumstances which enable others than the income receiver to know precisely how much he receives. Now, if the Government, instead of inquiring from the person who receives the income how much he receives, would inquire of the person who pays it to him how much he pays, it is obvious that the latter will have nothing to gain by a false statement, and that if he makes a false return to the Government he will insist upon being paid handsomely by his creditor. This at once complicates the scheme of fraud by intrusting the secret to two distinct persons, either of whom may, after a short time, quarrel with the other, and, from motives of revenge or under the promise of reward, might at any time betray his accomplice. In such cases, as a matter of course, the Government would constantly avow its intention to reward the informer and to punish severely the one who fails to inform. The amount of fraud which would be committed upon the Government under such circumstances would be so small that it may be left entirely out of account. The soundness of this theory is demonstrated by universal experience."

Is it possible that within the 1954 Internal Revenue Code it is shown that only the payers of income and not the receivers are liable for filing an income tax return?

The answer to the above question is easy to ascertain. Title 26, U.S.C., sections 6001 and 6011 impose the requirement of filing returns only on those expressly made "liable"

for the tax. The income tax is imposed in Subtitle A of Title 26, and in all of the sections thereof, only section 1461 expressly makes anyone "liable" for the income tax, and this section deals with the withholding agents for aliens and foreign corporations. Thus, only the withholding agents are required to deduct and withhold an income tax and file a return.

If it is only these withholding agents who are "liable" for the income tax, it would naturally and logically follow that only aliens and foreign corporations have their income taxed. For the most part, this is true. Taxable income under section 1 of the Code can only be determined by reference to section 61. Section 61 defines gross income, but, in so doing, mentions a thing called "source", which is fully treated also by the Code. Subchapter N of Subtitle A of Title 26 fully deals with the question of sources of income. Section 861 deals with income from sources within the United States, and section 862 deals with income from sources without the United States. Only aliens and foreign corporations have income from sources within the United States taxed; see sections 871 and 881. If aliens and foreign corporations desire to obtain the benefits of deductions and credits under the Code, they file returns; see sections 874 and 882 (c). For U.S. Citizens, sections 911 and 931 treat their income from sources outside the United States. The question to be asked in relation to U.S. citizens is this: what provision in the Code expressly states that the income of U.S. citizens from sources within the "United States" is subject to taxation? The government admits that there is no such authority. Enforcement of the income tax on U.S. citizens abroad depends upon tax treaties and conventions.

The above contention of Ward is not at variance with the position and policy of the Internal Revenue Service. In Internal Revenue Manual 1100, there are at least two sections thereof which confirm this precise argument. In section 1132.75 of this manual, the function of the Criminal Investigation Branch of the Internal Revenue Service is described as follows:

"The Criminal Investigation Branch enforces the criminal statute applicable to income, estate, gift, employment, and excise taxes (other than those excepted in IRM 1112.51) involving United States citizens residing in foreign countries and nonresident aliens subject to Federal income tax filing requirements"

And very similar functions are described in section 1132.93 of the same manual, which defines the activity of the Collection Branch of the Internal Revenue Service as follows:

"Executes the full range of collection activities on delinquent accounts which includes securing delinquent returns involving taxpayers outside the United States and those in United States territories, possessions and in Puerto Rico."

The above quotes are found within Internal Revenue Manual 1100 published on January 6, 1987.

The evidence presented at trial showed that Ward was not a withholding agent for any alien or foreign corporation; it showed that he was not an alien or affiliated in any way with a foreign corporation; it showed that he was not a U.S. citizen residing abroad. The evidence did show that he was a citizen of the State of Florida and was not "subject to the jurisdiction of the United States." His income was from sources within various States of this Union. Ward pointed out these defects regarding the imposition of the tax upon him; the government admitted that it had no authority to show precisely how the tax was imposed on him. Nonetheless, the Court of Appeals erroneously held that Ward was subject to the tax by implication. On this ground, Ward's writ should be granted.

CONCLUSION

For the foregoing reasons, this Court should grant Ward's petition and issue a Writ of Certiorari to the Court of Appeals.
Respectfully submitted,

Lowell H. Becraft, Jr.
209 Lincoln Street
Huntsville, Alabama 35801
(205) 533-2535

**Counsel of Record for
Petitioner, Arthur D. Ward**

APPENDIX A

UNITED STATES of America,

Plaintiff-Appellee,

v.

Arthur D. WARD,

Defendant-Appellant.

No. 87-3271

Non-Argument Calendar.

United States Court of Appeals,
Eleventh Circuit.

Dec. 16, 1987.

PER CURIAM

Arthur D. Ward was convicted of three counts of tax evasion (26 U.S.C. 7201), and two counts of making false statements or claims to a federal agency. 18 U.S.C. 1001. Ward makes three arguments on this appeal. First, he suggests that the United States has jurisdiction over only Washington, D.C., the federal enclaves within the states, and the territories and possessions of the United States. Secondly, he interprets the term "individual" within the Internal Revenue Code to apply only to those individuals located within this jurisdiction of the United States. Ward reaches this twisted conclusion by misinterpreting a portion of the Income Tax Code. The 1913 Act defined the words "state" or

"United States" to "include" United States territories and the District of Columbia; Ward asks this court to interpret the word "include" as a term of limitation, rather than of definition. Finally, Ward maintains that the only persons expressly and statutorily liable for income tax are the withholding agents of nonresident aliens and foreign corporations.

We find each of appellant's contentions to be utterly without merit. The district court properly denied Ward's motions for acquittal, and properly refused to instruct the jury as to Ward's theory of his defense. The opinion of the district court is

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 87-3271

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

ARTHUR D. WARD,
Defendant-Appellant.

Appeal from the United States District Court for the
Middle District of Florida

ON PETITION(S) FOR REHEARING AND SUGGESTION(S)
OF REHEARING IN BANC

(Opinion December 17, 1987, 11 Cir., 198__, __ F.2d
____).
(January 19, 1988)

Before HILL, FAY AND KRAVITCH, Circuit Judges

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no
member of this panel nor other Judge in regular active

service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are DENIED.

ENTERED FOR THE COURT:

Phyllis Kravitch
United States Circuit Judge

U.S. Court of Appeals
Eleventh Circuit
Filed
Jan 19, 1988
Miguel J. Cortez
Clerk
ORD-42

United States of America vs.
Arthur D. Ward
1301 Appleton Avenue, Orlando, Fl.

Docket No. 86-212-CR-Orl-18

JUDGMENT AND PROBATION/COMMITMENT ORDER

Counsel:

In the presence of the attorney for the government the defendant appeared in person on this date, April 13, 1987, with counsel, Lowell H. Becraft, Jr., Esquire (retained).

Plea:

Not Guilty.

Finding and Judgment:

There being a verdict of guilty. Defendant has been convicted as charged of the offense(s) of

Count I of the Indictment —

Did wilfully attempt to evade and defeat a large part of the income tax due and owing by him and his wife to the United States of America for calendar year 1980, by preparing and causing to be prepared, and by signing and causing to be signed, a false and fraudulent U.S. Individual Income Tax Return, Form 1040 on behalf of himself and his wife, which was filed with the I.R.S. wherein it was reported that their tax table income for said calendar year was the sum of \$11,349.80, and that the amount of tax due and owing thereon was the sum of \$941.00, whereas, as he then and

there well know and believed, their tax table income for the calendar year was substantially in excess of \$11,349.80, and that upon said tax table income there was owing to the United States an income tax substantially in excess of \$941.00, in violation of Title 26, USC 7201.

Count II of the Indictment —

Did willfully attempt to evade and defeat a large part of the income tax due and owing by him to the United States for calendar year 1981, in violation of Title 26, USC 7201.

Count III of the Indictment —

Did wilfully and knowingly make and cause to be made a false, fictitious, and fraudulent statement and representation to the Internal Revenue Service by submitting a Business Schedule C claiming that wages in the amount of \$53,126.25 were received as gross receipts from a business for calendar year 1981 and that said income was offset by cost of goods sold in the amount of \$53,367.58, resulting in no gross profit and no taxable income; whereas, Arthur D. Ward then and there well knew and believed, he did not engage in such business for said calendar year 1981, and that he had realized a substantial amount of taxable income, and owed a substantial amount of income tax on that taxable income, in violation of Title 18, USC 1001.

Count IV of the Indictment —

Did wilfully attempt to evade and defeat income tax due and owing by him to the United States of America for calendar year 1982, in violation of Title 26, USC 7201.

Count V of the Indictment —

Did wilfully and knowingly make and cause to be made a false, fictitious, and fraudulent statement and representation to the Internal Revenue Service by submitting a Business Schedule C claiming that wages in the count of \$54,220.54 were received as gross receipts from a business for calendar year 1982, and said income was offset by cost of goods sold in the amount of \$54,742.54, resulting in no gross profit and no taxable income; and owed a substantial amount of income tax on that income, in violation of Title 18, USC 1001.

Sentence or Probation Order:

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

IT IS ADJUDGED that on Count One of the Indictment, the defendant shall be committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of THREE (3) YEARS or until discharged as provided by law.

IT IS ADJUDGED that on Counts Two, Three, Four, and Five of the Indictment, the defendant shall be committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of TWO (2) YEARS on each count, imprisonment imposed to run concurrently with the sentence on each count and

concurrently with the sentence of imprisonment imposed on Count One of the Indictment.

IT IS ADJUDGED that the defendant pay a fine to the United States in the amount of FIVE THOUSAND DOLLARS (\$5,000.00) as to Count One and ONE THOUSAND DOLLARS (\$1,000.00) on Counts Two through Five each, for a total fine of NINE THOUSAND DOLLARS (\$9,000.00).

SPECIAL ASSESSMENT: Defendant shall pay a special assessment in the amount of FIFTY DOLLARS (\$50.00) on each of the Counts One through Five, for a total of TWO HUNDRED AND FIFTY DOLLARS (\$250.00).

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period. Offenses committed before 01-01-85.

Commitment Recommendation:

The court orders commitment to the custody of the Attorney General and recommends,

Richard B. Kellam
Senior United States District Judge,
sitting by designation.

APPENDIX B

STATUTES INVOLVED

18 United States Code, section 1001:

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

26 United States Code, Section 1:

"(a) Married individuals filing joint returns and surviving spouses. There is hereby imposed on the taxable income of every married individual ..."

26 United States Code, section 61:

"(a) General definition. Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items:"

26 United States Code, section 861:

“(a) Gross income from sources within United States. The following items of gross income shall be treated as income from sources within the United States:”

26 United States Code, section 862:

“(a) Gross income from sources without United States. The following items of gross income shall be treated as income from sources without the United States:”

26 United States Code, section 871:

“(a) Income not connected with United States business-30 percent tax.

(1) Income other than capital gains. There is hereby imposed for each taxable year a tax of 30 percent of the amount received from sources within the United States by a nonresident alien individual as — “

26 United States Code, section 874:

“(a) Return prerequisite to allowance. A nonresident alien individual shall receive the benefit of the deductions and credits allowed to him in this subtitle only by filing or causing to be filed with the Secretary or his delegate a true and accurate return, in the manner prescribed in subtitle F (sec. 6001 and following, relating to procedure and administration) ... “

26 United States Code, section 881:

“(a) Imposition of tax. There is hereby imposed for each taxable year a tax of 30 percent of the amount received from sources within the United States by a foreign corporation ... “

26 United States Code, section 882(c)(2):

“Deductions and credits allowed only if return filed. A foreign corporation shall receive the benefit of the deductions and credits allowed to it in this subtitle only by filing or causing to be filed with the Secretary or his delegate a true and accurate return, in the manner prescribed in subtitle F ... “

26 United States Code, section 1441:

“(a) General rule. Except as otherwise provided in subsection (c), all persons, in whatever capacity acting ... having the control, receipt ... of any items of income ... of any nonresident alien individual ... shall ... deduct and withhold from such items a tax equal to 30 percent thereof ... “

26 United States Code, section 1461:

“Every person required to deduct and withhold any tax under this chapter is hereby made liable for such tax and is hereby indemnified against the claims and demands of any person for the amount of any payments made in

accordance with the provisions of this chapter.”

26 United States Code, section 6001:

“Every person liable for any tax imposed by this title, or for the collection thereof, shall keep such records, render such statements, make such returns, and comply with such rules and regulations as the Secretary from time to time prescribe.”

26 United States Code, section 6011:

“(a) General rule. When required by regulations prescribed by the Secretary any person made liable for any tax imposed by this title, or for the collection thereof, shall make a return or statement according to the forms and regulations prescribed by the Secretary.”

26 United States Code, Section 7201:

“Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than \$10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.”

Treasury Income Tax Regulation 1.1-1(c):

“Who is a citizen. Every person born or naturalized in the United States, and subject to its jurisdiction, is a citizen.”